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In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, APPELLANT

v.

E. I. DU PONT DE NEMOURS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO CLARIFY AND DEFINE THE ASSIGNMENT OF ERRORS AND STATEMENT AS TO JURISDICTION OR IN THE ALTERNATIVE TO DISMISS

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Appellee's motion prays for dismissal of the appeal or entry of an order requiring the Government (1) to specify by number each finding of fact claimed to be erroneous and (2) to specify "with particularity" the questions, alleged to be substantial, "actually presented" by the district court's holdings.

I. REPLY TO CRITICISM OF THE "QUESTIONS PRESENTED" IN THE STATEMENT AS TO JURISDICTION

Appellee makes no serious attempt to show that the questions presented in the Government's

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jurisdictional statement require further particularization. They accord with the spirit and language of the Rules of this Court as revised on April 12, 1954. Rule 10, as revised, provides that the questions presented by an appeal should be "expressed in the terms and circumstances of the case but without unnecessary detail," should be "short and concise," and "should not resemble in form or particularity" the assignment of errors (abolished by the revised rules). The same requirements are found in paragraph 1 (c) (1) of Rule 15 of the Revised Rules.

Appellee contends, in varying language, that the questions which the Government has presented misinterpret the actual holdings of the district court (Motion, pp. 3, 8, 9, 10–11, 13, 14). The grounds of the decision below frequently are in issue on appeal, and the appellee's brief may bring such issue into focus by making a counterstatement of the questions presented. We believe it unnecessary, at this preliminary stage of the appellate proceedings, to reply at length to appellee's contention. To do so in a case of the breadth of this one would be to write a miniature brief on every issue raised by the appeal. We nevertheless briefly indicate our reasons for believing that the questions as we have presented them accurately reflect the holdings of the district court.

(1) The first question presented is whether the district court erred in holding that the charge

that du Pont illegally monopolized trade in cellophane is to be determined, not by du Pont's power to control this trade, but by its power to control trade in "flexible packaging materials." This question paraphrases finding 838, one of the district court's "Conclusions of the Master Facts." Moreover, the opinion, in dealing with "acquisition" by du Pont of "monopoly powers over cellophane" (Op. 311), discusses this matter solely upon the basis of trade in the many disparate products which the court denominated "flexible packaging materials," and makes not a single reference to du Pont's monopoly powers if cellophane is to be viewed as a separate and distinct "part" of commerce within the meaning of Section 2 of the Sherman Act (Op. 311–327).[1] The discussion ends with the sentence: "Character of the flexible packaging markets, measured by proof, establish du Pont as a manufacturer of cellophane does not have market control or monopoly power" (Op. 327).

The decision below clearly presents the question whether the charge that du Pont monopolized trade in cellophane is to be rejected if there is shown to be a free market in distinctly different products selling in an altogether different price category.

[1] Cf. the court's statement that the Government's contention that cellophane is a separate "part" of trade or commerce presents an issue "which is admittedly a difficult and somewhat novel one" (Op. 309).

(2) The second question presented is whether the district court, in holding that du Pont does not have power to exclude competitors, erred both in the tests which it applied and in those which it failed to apply. By way of controverting our statement that the district court, in passing upon power to exclude, disregarded certain facts of controlling importance, appellee refers to some 70 heterogeneous findings by the district court (Motion, p. 11). But the cited findings, when considered in connection with the court's organization of its findings,[2] in no way rebut our statement. Only two of the 70-odd cited findings are among the findings (354–388) dealing with exclusion of competitors.[3] And the court, in discussing power to exclude in its opinion (Op. 333–341), refers to none of the factors (except du Pont's patent position, Op. 339) which we said were disregarded in ruling on this issue.

(3) The substance of the third question is whether the district court, in holding that du Pont

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[2] The district court not only adopted *in toto* each of the 854 findings proposed by du Pont, but it also codified its findings under the headings and subheadings under which du Pont had codified its proposed findings.

[3] The two thus embraced (fngs. 354–355) are not only conclusionary in character but are phrased in terms of, not lack of power to exclude, but lack of proof that this power had been exercised.

Over 60% of the cited findings (fngs. 592–593, 602–645) are set forth under the caption (XII, B): "Du Pont did not *conspire* to monopolize with foreign concerns to exclude *imports*." [Emphasis supplied.]

does not have power to raise or control the price of cellophane, erroneously concluded that such power does not exist if price is a factor in volume of sales, and erroneously ignored (or treated as irrelevant) du Pont's power, vis-à-vis the one other domestic producer of cellophane, to raise or to control the price of cellophane. We disagree with the position taken by appellee that the issue thus raised is "no more than a question of fact" (Motion, p. 12). The question is not the correctness of the court's findings of specific facts relating to price, but the correctness of the criteria which it employed to determine whether du Pont had power, stemming from monopoly, to raise or control the price of cellophane.

(4) The fourth question presented is whether the court erred in failing to hold that du Pont's effective control of the cellophane market, coupled with numerous exclusionary acts tending to create and cement this control, constituted illegal monopolization irrespective of whether such acts were unlawful or predatory. This question is presented because the district court treated as relevant to the issue of monopolization only exclusionary acts which in themselves were illegal (under the court's view as to legality). Since the court consistently found to be legal every exclusionary act of du Pont to which it gave consideration, it never reached the question of the legality of effective market control acquired or maintained by exclusionary acts.

Time and again, the district court dealt with exclusionary acts from the standpoint of their illegality or predatory character. They are considered in the opinion under the headings "Is Origin of Du Pont's Position Lawful?" and "Was Du Pont's Position Maintained by Predatory Assertion of Monopoly Power?" (Op. 351, 359). In dealing with a variety of exclusionary or trade-restraining acts, the court concluded that the particular acts were "lawful," not "*per se* illegal;" of "inherent legality," not "aggressive," not "predatory," "lawful" under the Sherman Act, or not "illegal" under the Act (Op. 351, 353, 354, 355, 359, 361, 366, 367, 374).

An important and substantial question presented by the appeal is whether the district court failed to follow the settled construction of Section 2 of the Sherman Act. See Jurisdictional Statement, pp. 19–20.

(5) The fifth question presented, whether the court erred in holding that du Pont's moistureproof patent represents a defense to the monopoly charge, is phrased in the very words of the district court (Op. 344). Appellee asserts that the court's actual holding is narrower than what its broad and unqualified statement implies (Motion, p. 14). This concession, while it may narrow the issue presented by the fifth question, does not eliminate the important question of law, whether the moistureproof patent was unenforceable, and hence not a defense to any aspect of the

monopoly charge, because of du Pont's misuse of the patent.[4]

II. REPLY TO CRITICISM OF THE ASSIGNMENT OF ERRORS

Appellee prays for an order requiring the Government to specify by number each finding of fact which it claims to be erroneous. We find in the Revised Rules recently adopted by this Court no requirement or even authorization of such specification.

Appellee suggests that grant of its prayer would lighten the burden placed on this Court in deciding an appeal in a case of the character of this one. We submit that in such a case the briefs on the merits and the oral argument provide the most effective means for sharpening and focusing the issues. Specifying by number the findings alleged to be erroneous does not serve this purpose. Where, as here, many findings are phrased in equivocal language, so that their meaning and scope are in doubt, an appellant, in order

[4] Appellee has referred to "unqualified concessions" by the Government at the trial respecting the validity, for the purposes of this case, of "all claims" of du Pont's moistureproof patent (Motion, n. 5, p. 15). However, the Government merely stated that it would not "introduce any evidence" respecting the validity of any du Pont patent, or make a "collateral attack" upon du Pont's patents (Tr. 6961–2). The Government, in so stating, reserved the right to argue, on the basis of any evidence in the record, both the scope of any du Pont patent and du Pont's state of mind as to the validity of any of its patents (*ibid.*).

to guard against the claim that his failure to specify error as to a particular findings forecloses some aspect of his appeal, must resolve all doubts in favor of specifying error. The result is likely to be wide specification of error, leaving in obscurity the real scope of the attack on the findings. This Court's criticism of assignment of errors has been directed to the excessive number of errors assigned, not the failure to list the particular findings attacked. See *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 596, where the assignment set forth 69 alleged errors in the district court's findings of fact.

In the present case the primary basis of appeal is that erroneous conceptions as to the meaning and application of Section 2 of the Sherman Act infected the district court's adjudication, with consequent failure by the district court properly to evaluate the facts shown by the evidence (and incorporated for the most part in its findings). We dispute appellee's statements that the appeal constitutes "a sweeping attack on virtually everything done by the district court" and that it seeks a trial *de novo* "of the whole of the scope of the issues of fact" determined by the district court (Motion, pp. 3, 5). The statements seem designed to picture an appeal which could not succeed; and if the characterizations are sound, appellee has nothing to fear from the appeal.

The statement as to jurisdiction and the assignment of errors are phrased in terms of substantive issues. An attack on findings, defined and limited in this way, is more illuminating than a largely meaningless compilation of particular findings wholly or partly drawn in question.

United States v. *Griffith*, 334 U. S. 100, furnishes direct precedent for the course followed in the instant case. In *Griffith* the district court ruled that no violation of the Sherman Act had been established, and it made lengthy numbered findings of fact (Record, No. 64, October Term, 1947, pp. 83–128). On appeal, 21 of the 27 errors set forth in the assignment of errors were directed at the court's findings, but no finding was designated by number (*id.*, pp. 130–132).

We submit that, for the foregoing reasons, appellee's motion should be denied.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

STANLEY N. BARNES,
Assistant Attorney General.

CHARLES H. WESTON,
Special Assistant to the Attorney General.

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